

**Case No. 083739**

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**IN THE MISSOURI SUPREME COURT**

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**STATE EX REL. AMERICAN  
ECONOMY INSURANCE COMPANY,**

**Relator,**

**v.**

**HONORABLE WILLIAM C. CRAWFORD,  
Circuit Judge, Jasper County Circuit Court,**

**Respondent.**

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**RELATOR'S OPENING BRIEF**

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**From the Circuit Court  
of Jasper County, Missouri  
The Honorable William C. Crawford, Judge  
Circuit Court No. CV199-640CC**

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## **JURISDICTIONAL STATEMENT**

The Relator American Economy Insurance Company invokes the jurisdiction of this Court pursuant to Article V, § 4, of the Missouri Constitution and pursuant to Rules 94 and 97 of the Missouri Supreme Court Rules.

The underlying action now pending in the Circuit Court of Jasper County, Missouri is a combination of Plaintiffs' medical malpractice claims against a hospital and several health care providers and Plaintiffs' claim against the Relator for benefits under an under-insured motorist coverage of an insurance policy.

The Relator invokes the jurisdiction of this Court pursuant to Article V, § 4 of the Missouri Constitution, seeking superintending control by way of the writ of prohibition or, in the alternative, by the writ of mandamus directed to the Respondent Circuit Judge, the Honorable William C. Crawford, related to a discovery order entered by the Respondent in the underlying case on February 7, 2001, in which the Respondent denied Relator's request for discovery. The Relator made application, but the Southern District of the court of appeals denied Relator's request for an original remedial writ, requested in the alternative as in this Court, concerning the Respondent's order, by order dated May 14, 2001.

This Court entered its preliminary order in prohibition on August 21, 2001. The Respondent made his written return on or before September 20, 2001, as ordered by this Court.

Pursuant to Missouri Supreme Court Rule 84.22(a), the Relator made application for an original remedial writ to a lower court. Accordingly, pursuant to Article V of the Missouri Constitution, §§ 4 and 5, and Rules 84, 94, and 97, the Relator invokes the jurisdiction of this Court.

## **PRELIMINARY STATEMENT**

Plaintiff asserted medical malpractice claims against a hospital and several health care providers and a claim against the Relator for benefits under underinsured motorist coverage of an insurance policy in the case now pending in Jasper County Circuit Court.

Plaintiff was in an automobile accident in Parsons, Kansas in July of 1998, and brought an action in Kansas District Court against the City of Parsons, Kansas, and the Relator. Plaintiff settled some of his claims, and dismissed his case against the Relator without prejudice. Plaintiff thereafter commenced a medical malpractice case in the Jasper County Circuit Court regarding the medical care he received in Joplin, Missouri in August of 1998. Plaintiff added the Relator as a party in the medical malpractice case.

Plaintiff moved to quash the subpoena and for a protective order regarding the Relator's notice to take the oral deposition of the accident reconstruction expert identified by the plaintiff in the previously dismissed Kansas case. Plaintiff previously disclosed the name and report of the expert concerning the July 1998 accident and the intersection at issue. Plaintiff claimed work product privilege as to the expert and his work, and disputed Relator's claim that plaintiff waived a claim of work product by his disclosures in the dismissed Kansas case. The respondent circuit judge agreed with the plaintiff's position, and granted the motion to quash.

This Court must decide (1) Did plaintiff waive the claim of work product privilege by his prior disclosures? and (2) Did Respondent abuse or exceed his jurisdiction or abuse his discretion in granting plaintiff's motion to quash and for protective order?

## **STATEMENT OF FACTS**

### **THE PARTIES**

Plaintiff Curtis Jackson, Sr., is an individual citizen who is a resident of the State of Kansas, and by reason of incapacity is represented by his guardian, Lilley Mosley. Relator's Petition for Writ ("RPW"), (paragraph 1 and Exhibit "J"; Respondent's Answer to Writ of Prohibition) ("RAW"), paragraph 1). The Relator American Economy Insurance Company is an insurance company and a defendant in the underlying action in the Circuit Court. (RPW, paragraph 2, and Exhibit "K"; RAW, paragraph 2). The Honorable William C. Crawford is the duly appointed circuit judge sitting in Division 1 of the Circuit Court of Jasper County, Missouri, at Joplin, and is the Respondent herein. (RPW, paragraph 3; RAW, paragraph 3).

### **GENERAL BACKGROUND: CLAIMS OF PARTIES**

#### **PERTINENT TO RELATOR'S PETITION**

On or about July 6, 1998, in Parsons, Kansas, Labette County, Kansas, Plaintiff Curtis L. Jackson was involved in a collision with a vehicle operated by a person named Jesse Scheper. (RPW, paragraph 6, Exhibit "K", paragraph 3; RAW, paragraph 6). Plaintiff Curtis Jackson claims he is entitled to underinsured motorist coverage benefits from Relator American Economy Insurance Company related to the July 6, 1998 collision in Parsons, Kansas. (RPW, paragraph 7, Exhibit "J," Count I; RAW, paragraph 7). Whether the Plaintiff's claims are barred or should be reduced as a result of the negligence of the City of Parsons, Kansas, in failing to maintain the stop sign at the intersection where the accident occurred, or in failing to have a stop sign with proper reflective properties, or properly placed, and unobstructed by overhanging vegetation, is a disputed issue in the underlying action. (RPW, paragraph 8, Exhibit "K,"



Relators 2<sup>nd</sup> Amended Answer, paragraphs 4, 5, 6; RAW, paragraph 8, RPW, Exhibit J, Plaintiff's Amended Petition, Count I).

Before filing the underlying action case now before this Court, plaintiff Curtis Jackson filed a lawsuit against Relator American Economy Insurance Company in the District Court of Labette County, Kansas, seeking underinsured motorist coverage benefits ("Kansas case"). (RPW, paragraph 9, Exhibit "C"; RAW, paragraph 9). The Relator answered plaintiffs' claims in the Kansas Case, and asserted that any damages claimed by Plaintiff Curtis Jackson related to the July 6, 1998 accident were caused by the negligence of the City of Parsons, Kansas, and others. (RPW, paragraph 10, Exhibit "D"; RAW, paragraph 10). In the Kansas case, plaintiff designated persons as retained expert witnesses, and provided a copy of his expert witness designations and copies of records or reports from those experts to Relator. (RPW, paragraph 11, Exhibit "E", paragraphs 1-6; RAW, paragraph 11).

Plaintiff identified and designated James Loumiet as an expert witness in the Kansas case. (RPW, Exhibit E, paragraph 6). In his designation, plaintiff stated that Mr. Loumiet had visited the site of the July 6, 1998 accident; that tree limbs and other vegetation obstructed the traffic control signs; that it is in violation of certain standards; that the traffic control sign had inadequate retro-reflectivity; and that "Mr. Loumiet's opinion is that the combination of the obstructed view and inadequate retro-reflectivity of the traffic control signs substantially contributed to the accident." (RPW, paragraph 12, Exhibit "E," paragraph 6; RAW, paragraph 12). James A. Loumiet was a "retained expert" of plaintiff in the Kansas case. (RPW, Exhibit "E," pp. 1 and 2). The designation by plaintiff of Mr. Loumiet states the following:

"James Loumiet, will testify that he inspected the accident site and that the tree limbs and other vegetation obstructed the traffic control sign and is in violation **MUCTD**,

**Handbook H of Traffic Control Practices For Low Volume, Rural Roads, 2<sup>nd</sup> Edition, and Vegetation Control for Safety.** Further, inadequate retro-reflectivity of the traffic control sign violates **MUCTD**. Mr. Loumiet's opinion is that the combination of the obstructed view and inadequate retro-reflectivity of the traffic control sign substantially contributed to the accident."

(RWP, Exhibit "E," p. 2, paragraph 6). Mr. Loumiet prepared a report dated October 29, 1999, and plaintiff provided a copy of same to Relator. (RWP, paragraph 13, Exhibit "F"(Exhibit C therein [hereinafter sometimes also referred to as "Loumiet Report"]); RAW, paragraph 13). Mr. Loumiet's October 29, 1999 report [Loumiet Report] indicates he completed an analysis of the accident and reviewed several materials. Mr. Loumiet reviewed several materials including State of Kansas Accident Report, photographs of the accident site, discovery responses, statements of individuals, an investigative report of an investigation company, manuals or handbooks published by the Federal Highway Administration, a handbook published by the Kansas Department of Transportation, and a handbook published by a private association of State Highway and Transportation Officials. See Loumiet Report. Mr. Loumiet's report indicates he "personally inspected and measured the accident site and the Jackson vehicle," and based on his analysis, he reached "professional opinions and conclusions." Loumiet Report. Generally, Mr. Loumiet made three opinions and conclusions: the stop sign at the intersection had very low retro-reflectivity at the time of the accident, which made it difficult or impossible for motorists to see the stop sign; the view of the stop sign and a quadrant of the intersection was blocked by tree branches at the time of the accident; and there was insufficient sight distance due to vegetation which made it difficult or impossible for motorists on

Thornton for stopped eastbound motorists to enter the intersection without colliding with a conflicting vehicle. Loumiet Report. Mr. Loumiet's report also states the following:

“In conclusion, it is my professional opinion that the intersection of 25<sup>th</sup> and Thornton was dangerous and hazardous at the time of the accident, and was a contributing factor in the occurrence of the subject collision.”

Loumiet Report, Exhibit “C” to RPW Exhibit F. (Loumiet Report, attached as Appendix).

The District Court in the Kansas case took up plaintiff's motion, and dismissed plaintiff's claim against Relator without prejudice. (RPW, paragraph 14, Exhibit I; RAW, paragraph 14). No trial occurred in the Kansas case. Mr. Loumiet's deposition has not been taken in the Kansas case or in the underlying action now pending before the Respondent.

DISCOVERY REQUESTED BY RELATOR IN MOTION TO QUASH

AND FOR PROTECTIVE ORDER BY PLAINTIFF

Relator requested to take the oral deposition of Mr. James Loumiet, seeking all information known to him to exist concerning an automobile accident of July 6, 1998, at the intersection of 25<sup>th</sup> Street and Thornton Street in Parsons, Labette County, Kansas, and investigation known by him to have been done concerning the intersection, signs, site distance, and driver action. (RPW, paragraph 15, Exhibit “G”; RAW, paragraph 15).

DISCOVERY DISPUTE ISSUES; ARGUMENTS;

AND RULING BY THE CIRCUIT JUDGE

Plaintiff filed a Motion to Quash and for Protective Order concerning Relator's Notice to Take Deposition and Subpoena *Duces Tecum* for James Loumiet's deposition. (RPW, paragraph 16, Exhibit

“H”; RAW, paragraph 16). Plaintiffs’ motion states, “this motion is based on the grounds that Mr. Loumiet is plaintiffs’ consulting expert on accident reconstruction and his findings and opinions are the work product of plaintiffs’ counsel.” (RPW, Exhibit “H,” p. 1). Plaintiffs’ motion also stated that a testifying expert can be withdrawn prior to their deposition, and counsel retaining that expert can claim work product protection as to that retained expert since the expert will not be called for trial. (RPW, Exhibit “H,” p. 2).

At the hearing on the motion to quash, plaintiffs argued to the Circuit Judge that the *Tracy v. Dandurand*, 30 S.W. 3d 831 (Mo. banc. 2000) case decided by this Court allows plaintiff to withdraw Mr. Loumiet as a testifying expert prior to deposition and that plaintiff will only be using Mr. Loumiet as a consulting expert. (RPW, paragraph 20, Exhibit “A,” p. 6, ll. 2-18; Exhibit “F”; RAW, paragraph 20).

Plaintiff informed the Circuit Judge, that plaintiff had previously provided Relator a copy of the October 29, 1999 report prepared by Mr. Loumiet pursuant to the scheduling order in the Kansas case. (RPW, paragraph 21, Exhibit “A,” p. 14, ll. 2-9; RAW, paragraph 21). No deposition of Mr. Loumiet occurred in the Kansas case. (RPW, paragraph 22, Exhibit “A,” p. 14, ll. 9-14; RAW, paragraph 22).

It is plaintiffs’ position that Mr. Loumiet will only be used as a consulting expert, and not as a testifying expert in the underlying case. (RPW, paragraph 23, Exhibit “A,” p. 6, ll. 15-18; RAW, paragraph 23). Plaintiff claimed at the motions hearing that until the deposition of Mr. Loumiet takes place, even if right before the deposition, the expert’s name can be withdrawn altogether, and the expert can be used as a consulting expert, and that is what makes Mr. Loumiet off-limits for discovery purposes. (RPW, paragraph 24, Exhibit “A,” p. 14, l. 19 through p. 15, l. 3; RAW, paragraph 24). The parties do not dispute that Mr. Loumiet was never designated as a retained witness in the Missouri case now pending in Jasper County, was never identified as a person who would give testimony in the Missouri case, and was

never withdrawn by plaintiff, because plaintiff's position is that for purposes of the Missouri case, Mr. Loumiet is a consulting expert and therefore beyond the scope of discovery.

Plaintiff provided a copy to, and the Respondent Judge Crawford considered the *Tracy v. Dandurand* case before ruling on the motion to quash at the motions hearing. (RPW, paragraph 25, Exhibit "A," p. 8, l. 23 through p. 9, l. 3; RAW, paragraph 25). Relator stated its position at the motions hearing that the *Tracy v. Dandurand* case does not control the issue, and that since plaintiff's counsel provided copy of the Loumiet report at issue, the plaintiff waived and cannot now claim work product privilege. (RPW, paragraph 26, Exhibit "F," p. 2; RAW, paragraph 26). There is no dispute between the parties that plaintiff provided a copy of the Loumiet report which is at issue to the Relator. (RPW, paragraph 27, Exhibit "A," p. 6, l. 21 through p. 7, l. 18; RAW, paragraph 27).

At the motions hearing, the Relator provided the Respondent Circuit Judge a copy and argued that under the *Brown v. Hamid*, 856 S.W. 2d 51 (Mo. banc. 1993) case decided by this Court, the plaintiff had waived any claim of work product privilege because when a person surrenders information, a waiver of work product privilege occurs as to that information. (RPW, paragraph 28, Exhibit "A," p. 7, l. 19 through p. 8, l. 22; RAW, paragraph 28). The argument at the motions hearing by Relator was that a waiver of the plaintiff's work product privilege as to the report prepared by Mr. Loumiet occurred as to the materials and information as the time of the report, and further, that Relator did not request to delve into any opinions or attorney strategy developed since the disclosure of the report. (RPW, paragraph 29, Exhibit "A," p. 11, l. 6 through p. 6, l. 9; RAW, paragraph 29). Since the Loumiet report at issue does not indicate that Mr. Loumiet received any information from plaintiff's attorney about work product,

attorney opinions, or attorney mental processes, the Relator argued at the motions hearing that the discovery requested should be allowed. (RPW, paragraph 30, Exhibit “A,” p. 13, ll. 6-10; RAW, paragraph 30).

Mr. Louniet went to the accident site in Kansas and made conclusions about what he saw and that he viewed photographs and the vehicles involved in the accident. (RPW, paragraph 31, Exhibit “A,” p. 12, l. 16 through p. 13, l. 18; RAW, paragraph 31). The Relator also argued that since Mr. Louniet has that factual information, the Relator can depose Mr. Louniet on the factual substance of his report. (RPW, paragraph 31; RAW, paragraph 31). In connection with the factual discovery requested concerning his observations and as recorded in Mr. Louniet’s report, the Relator referred the Honorable Respondent Circuit Judge to the Missouri Supreme Court case, *State ex rel. Missouri Public Service v. Elliott*, 434 S.W. 2d 532 (Mo. banc. 1968) and argued that case entitled the Relator to discover the factual information of the Louniet report. (RPW, paragraph 32, Exhibit “A,” p. 20, ll. 2-13; RAW, paragraph 32).

The parties do not dispute that even though canceled and not currently scheduled at the time of the motions hearing, the deposition notice indicated and the Relator continued at that time and continues to seek to take the deposition of Mr. Louniet. (RPW, paragraph 33, Exhibit “A,” p. 19, ll. 3-9; RAW, paragraph 33).

The Respondent Circuit Judge based his ruling at the motions hearing after considering the *Brown v. Hamid* case and the *Tracy v. Dandurand* case. (RPW, paragraph 34, Exhibit “A,” p. 18, ll. 13-24; RAW, paragraph 34). Regarding the Respondent’s interpretation of the *Dandurand* case, the court determined that Mr. Louniet was a consulting expert, whom the plaintiff, through his attorney, said at the

motion hearing was such that Mr. Loumiet would not be called at trial and therefore, plaintiff retained the work product supplied. (RPW, paragraph 34, Exhibit “A,” p. 18, ll. 13-24; RAW, paragraph 34). The Respondent Circuit Judge also reflected his consideration of the *Brown v. Hamid* case, stating he did not guess that work product had been supplied by the plaintiff, that Mr. Loumiet had not been authorized to talk to the other side, that he is not going to be a witness, and further questioned where and when Relator was claiming plaintiff had waived work product immunity. (RAW, paragraph 34, Respondent’s Exhibit “2,” pp. 10-11, *Transcript from Motions Hearing*). The Relator’s position stated to the Respondent at the motions hearing was that the waiver concerning Mr. Loumiet and his report occurred in the Kansas case in connection with the discovery in that case. (RPW, Exhibit “A,” p. 11). The Relator also noted to the Respondent that the plaintiff had made a motion to join American Economy Insurance Company in the underlying case, and they added American Economy Insurance Company as a defendant in the case. (RPW, Exhibit “A,” p. 12). The Relator’s position announced to the Respondent at the motions hearing was that any time a person gives up something like the Loumiet report, the privilege is waived and that the *Brown v. Hamid* case is right on that issue. (RPW, Exhibit “A,” p. 12). After those considerations, the Respondent The Circuit Judge ruled the motion, stating:

“All right. Well, I think that the Dandurand case, Tracy v. Dandurand provides the guidance the Court needs in this and I think this consulting expert or the person that plaintiff now says is the consulting expert and will not be called at trial retains the work product supplied, so I disagree with your interpretation of the cases. So I’m going to sustain the Motion to Quash.”

See RPW, Exhibit A, p. 18, lines 13-24. Tthe Circuit Court docket sheet reflects the following entry for February 7, 2001:

“Hearing held. Parties appear by counsel. Court takes up Motion to Quash filed by Plaintiff. Motion sustained. So ordered. William C. Crawford, Circuit Judge.”

(RPW, Exhibit “B.”).

The Southern District of the court of appeals denied Relator’s request for an original remedial writ concerning the Respondent’s order by its Order dated May 14, 2001. (RPW, Exhibit “L.”).



### **POINTS RELIED ON**

**RELATOR AMERICAN ECONOMY INSURANCE COMPANY IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT, THE HONORABLE WILLIAM C. CRAWFORD, FROM ENFORCING HIS ORDER OF FEBRUARY 7, 2001 SUSTAINING PLAINTIFFS' MOTION TO QUASH RELATOR AMERICAN ECONOMY INSURANCE COMPANY'S NOTICE TO TAKE DEPOSITION OF MR. JAMES LOUMIET ON THE GROUNDS THAT MR. LOUMIET IS PLAINTIFFS' CONSULTING EXPERT ON ACCIDENT RECONSTRUCTION AND HIS FINDINGS AND OPINIONS ARE THE WORK PRODUCT OF PLAINTIFFS' COUNSEL BECAUSE THE PLAINTIFFS HAVE WAIVED ANY CLAIM OF WORK PRODUCT PRIVILEGE AS TO MR. LOUMIET AND HIS REPORT IN THAT PLAINTIFFS IDENTIFIED MR. LOUMIET AND PROVIDED RELATOR A COPY OF MR. LOUMIET'S WRITTEN OPINIONS, CONCLUSIONS, AND REPORT.**

*State ex rel. Day v. Patterson*, 773 S.W. 2d 224 (Mo. App. 1989)

*State ex rel. Friedman v. Provaznik*, 668 S.W. 2d 76 (Mo. banc. 1984)

*Brown v. Hamid*, 856 S.W. 2d 51 (Mo. banc. 1993)

*State ex rel. Mitchell Humphrey & Co. v. Provaznik*, 854 S.W. 2d 810 (Mo. App. E.D.

1993)

### **ARGUMENT**

**RELATOR AMERICAN ECONOMY INSURANCE COMPANY IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT, THE HONORABLE WILLIAM C. CRAWFORD, FROM ENFORCING HIS ORDER OF FEBRUARY 7, 2001 SUSTAINING PLAINTIFFS' MOTION TO QUASH RELATOR AMERICAN ECONOMY INSURANCE COMPANY'S NOTICE TO TAKE DEPOSITION OF MR. JAMES LOUMIET ON THE GROUNDS THAT MR. LOUMIET IS PLAINTIFFS' CONSULTING EXPERT ON ACCIDENT RECONSTRUCTION AND HIS FINDINGS AND OPINIONS ARE THE WORK PRODUCT OF PLAINTIFFS' COUNSEL BECAUSE THE PLAINTIFFS HAVE WAIVED ANY CLAIM OF WORK PRODUCT PRIVILEGE AS TO MR. LOUMIET AND HIS REPORT IN THAT PLAINTIFFS IDENTIFIED MR. LOUMIET AND PROVIDED RELATOR A COPY OF MR. LOUMIET'S WRITTEN OPINIONS, CONCLUSIONS, AND REPORT.**

**STANDARD OF REVIEW**

A party may use the writ of prohibition to test whether a trial court has abused this discretion in denying discovery. *State ex rel. Dixon v. Darnold*, 939 S.W. 2d 66, 68 (Mo. App. S.D. 1997). Prohibition is a proper remedy when a trial court enters a protective order or denies discovery which amounts to an abuse of discretion. *State ex rel. Charter Bank Springfield, N. A. v. Donegan*, 658 S.W. 2d 919, 924 (Mo. App. S.D. 1983). An abuse of discretion warranting the remedy of prohibition occurs when a trial court sustains a motion to quash a deposition which seeks relevant, non-privileged

information regarding the subject matter involved in the action. *State ex rel. Wilson v. Davis*, 979 S.W. 2d 253, 255 (Mo. App. S.D. 1998). Prohibition will also issue where a trial court decides an important question of law erroneously which will escape review on appeal, and the aggrieved party may suffer considerable hardship and expense as a result of the erroneous decision. *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W. 2d 862, 863 (Mo. banc. 1986). A trial court's denial of the parties' discovery requests which may cause the requesting party to suffer considerable hardship and expense, which may be uncorrectable on appeal, justifies an order of prohibition for purposes of judicial economy. *Ferrellgas, L.P. v. Williamson*, 24 S.W. 3d 171, 175 (Mo. App. W.D. 2000).

#### APPLICABLE LAW: WORK PRODUCT PRIVILEGE

This Court has recently described the work product doctrine:

“Work product has evolved into a two-pronged doctrine that consists of both tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of an attorney's mental impressions, conclusions, opinions, and legal theories – sometimes called opinion work product).”

*State ex rel. Atchison, Topeka, & Santa Fe Ry. Co. v. O'Malley*, 898 S.W. 2d 550, 552 (Mo. banc. 1995).

The rules of discovery recognize that a retained expert can play two roles in a case. First, an expert can be a “consultant” giving opinions to advise the legal team. Second, an expert can be a trial witness. *Brown v. Hamid*, 856 S.W. 2d 51, 54 (Mo. banc. 1993). The “work product doctrine” exists to protect an attorney's mental impressions, conclusions, opinions, and legal theories, all essential to the

attorney's proper preparation of the client's case. *O'Malley*, 898 S.W. 2d at 552. Missouri Supreme Court Rule 56.01(b)(4)(a) requires that a party disclose, upon interrogatory, the names of expert witnesses. Until such an interrogatory, retained experts are "consultants," and their written opinions constitute the work product of the attorney. *Brown*, 856 S.W. 2d at 54. Under Rule 56.01(b)(3), work product enjoys a "qualified immunity" from discovery. *Brown*, 856 S.W. 2d at 54 (citing *State ex rel. Missouri Highways and Transp. Commission v. Legere*, 706 S.W. 2d 560, 566 (Mo. App. S.D. 1986)). This immunity is absolute with regard to the mental impressions, conclusions, or opinions of consultants. *Id.*

#### APPLICABLE LAW: WAIVER OF WORK PRODUCT PRIVILEGE

A party may waive work product immunity privilege. Waiver occurs by production of documents or written disclosure. This Court has previously addressed the issue of waiver of work product immunity, and the scope of waiver of work product immunity. In *Brown v. Hamid*, 856 S.W. 2d 51 (Mo. banc. 1993), the Court addressed the issue concerning claimed improper *ex parte* contact by an attorney and a non-treating physician expert witness whom the plaintiff had designated by interrogatory answer and whose written report had been disclosed in discovery. 856 S.W. 2d at 53-54. This Court stated:

"A party waives any work product immunity for a consultant by giving the work product to the other side, or by authorizing the consultant to talk to the other side." *Id.* at 54.

The issue in the *Brown v. Hamid* case concerned *ex parte* contact of an expert witness, whose identity had been revealed by an answer to an interrogatory asking for the name of each expert witness and the general nature of the subject matter of the expert witness. *Id.* at 53. A written one-page opinion authored by the expert had also been provided in connection with the interrogatory answer. This Court

addressed the issue whether opposing counsel may contact *ex parte* an expert retained by the other side in terms of the scope of the waiver occurring by prior disclosure. This Court held that the rules of discovery did not preclude informal discovery by way of *ex parte* contact and such should occur “. . . within the scope of the waiver by that disclosure.” The identification of a retained expert consultant begins the process of waiving immunity. *Id.* at 54. Once an anonymous consulting expert’s identity becomes known by virtue of prior disclosure, the adverse party may consult with that person to the detriment of the engaging party. *State ex rel. Richardson v. Randall*, 660 S.W. 2d 699, 701 (Mo. banc. 1983). This Court held in *Brown v. Hamid* that the *ex parte* contact which had occurred in that case concerning the one-page summary of the expert’s opinion provided by the expert witness disclosure was within the scope of the waiver by that disclosure. 856 S.W. 2d at 54.

In *State ex rel. Mitchell Humphrey & Co. v. Provaznik*, 854 S.W. 2d 810 (Mo. App. E.D. 1993), the Court of Appeals held the plaintiff waived work product immunity for certain documents previously produced by plaintiff for review by the defendant. Plaintiff had brought a malpractice action against its former accounting firm. A replacement accounting firm subsequently hired by the plaintiff provided assistance and consultation to the plaintiff. The defendant’s former accounting firm sought to obtain a variety of materials and served a subpoena *duces tecum* on the replacement firm. The replacement firm produced a number of items, but withheld certain documents, including memoranda to the plaintiff’s tax file, on the ground of work product privilege. 854 S.W. 2d at 811-812.

The tax memoranda had been previously produced. *Id.* and note 2. The court of appeals sustained the assertion of work product privilege and the objection to production of documents involving expert analysis prepared in anticipation of litigation and letters containing the conclusions, opinions, or legal

theories of the plaintiff's attorney or his representative not previously produced or disclosed. *Id.* However, the court of appeals recognized that “. . . [the documents plaintiff] previously produced, whether intentionally or inadvertently, do not have any work product immunity.” *Id.* at 814, note 3.

The court of appeals has also previously held that a party relinquishes a discovery objection based on work product privilege by voluntary disclosure of the protected information claimed. In *State ex rel. Mueller v. Dixon*, 456 S.W. 2d 594 (Mo. App. 1970), the Western District of the court of appeals held that by providing the information requested in certain allegations of an application for writ of prohibition, the Relator had effectively answered the interrogatory to which the work product privilege objection had previously been made. *Id.* at 597. “Work product immunity, as any other, may be relinquished by voluntary disclosure of the protected information.” *Id.*

#### RELATED CASES OR LITIGATION: WORK PRODUCT PRIVILEGE

This Court addressed the issue of work product privilege in related litigation in *State ex rel. Friedman v. Provaznik*, 668 S.W. 2d 76 (Mo. banc. 1984). In the *Friedman* case, at issue was a grand jury's subpoena *duces tecum* to a member of a law firm which formerly represented a school district. There was a motion to quash the subpoena *duces tecum* in connection with investigation into allegedly excessive legal fees. The motion asserted that the subpoena required disclosure of matters claimed to be protected by the attorney/client and work product privileges, and that the subpoena sought documents beyond the permissible scope of the grand jury's investigation. *Id.* at 77-78. In the *Friedman* case, this Court determined that because the privilege is designed to prevent a party from reaping the benefits of his opponent's labors, its applicability is generally limited to those cases in which a party's substantive preparation for the same or a related cause of action would benefit from access to his adversary's materials

prepared in anticipation of litigation of that particular cause. 668 S.W. 2d at 80. Adopting that reasoning, the court of appeals in *State ex rel. Day v. Patterson*, 773 S.W. 2d 224 (Mo. App. 1989) held, “we construe the work product rule to mean that documents prepared in anticipation of any related litigation or trial are qualifyably immune and may be obtained only upon the requisite showings.” *Id.* at 229.

STATE EX REL. TRACY V. DANDURAND, 30 S.W. 3D 831 (MO. BANC. 2000)

The *State ex rel. Tracy v. Dandurand*, 30 S.W. 3d 831 (Mo. banc. 2000) case concerns issues about a party preserving the attorney/client privilege in terms of expert witness disclosure of such materials and the timing of oral depositions. This Court addressed the question whether a party continues to have an attorney-client privilege as to documents that the party has provided to its retained expert witness who is designated to testify. 30 S.W.3d at 832. This Court’s answer – all material given to a testifying expert must, if requested, be disclosed – established a “bright line” ruling. 30 S.W.3d at 836. This Court did not address, but presumed that an attorney has the option of withdrawing a testifying expert’s designation prior to deposition and then claim work product protection as to that expert – so that the information-revealing event, the deposition, does not occur. *Id.*

In *State ex rel. Tracy v. Dandurand*, the plaintiff sued her automobile liability insurer for bad faith for allegedly exposing her to liability in excess of the policy coverage limits in its defense of her in an underlying bodily injury claim. The defendant insurer turned over a confidential attorney report and the letter prepared by the insurer’s attorney concerning those claims to the expert it had designated to testify on behalf of the insurer in the bad faith action. During a deposition of the expert taken by the insured, the expert provided a copy of his file materials, and stated that he had reviewed his entire file. The plaintiff attempted to examine the attorney author of the report and letter, but the attorney refused, citing the

attorney/client privilege. Later, the insurer took the trial deposition of its expert. During cross-examination, the expert testified about the report and letter. This Court addressed issues concerning the following rulings by the trial court: sustaining the insurer's motion in limine to exclude use of the documents; denying the insured's motion to compel the insurer's attorney to answer deposition questions about the report and letter; and prohibiting the insured from asking any witnesses about the documents. This Court prohibited the trial judge from enforcing his orders.

This Court resolved the issues in the *State ex rel. Tracy v. Dandurand* case by construing the discovery provisions of Rule 56.01 concerning expert witnesses. This Court noted that "the discovery of facts known and opinions held by an expert are, until the expert is designated for trial, the work product of the attorney retaining the expert." This Court further stated, "if the party's attorney, in preparing the expert for deposition, finds that privileged documents have been mistakenly provided to the expert, the attorney presumably has the opinion of withdrawing the expert's designation prior to deposition." *Id.* at 835. Under the facts of the *State ex rel. Tracy v. Dandurand* case, this Court determined the attorney/client privilege waived, stating, in pertinent part:

"But here the expert had been provided the materials, was designated to testify, had his deposition taken, and had provided opposing counsel with the documents Farmer's gave to him. It is simply too late to withdraw his designation in order to make the documents secret again. Once the expert's testimony is taken, the deposition is available for use by any party, subject to Rule 57.07 . . . the bell has been rung and cannot be un-rung . . ."

30 S.W. 3d at 836.

#### ANALYSIS



The Respondent exceeded his jurisdiction or abused his discretion in denying the discovery requested by the Relator. The reasons why this Court should allow the discovery requested are as follows.

First, the plaintiff waived any claim of privilege as to the report prepared by Mr. Loumiet because he voluntarily provided both the identity of his claimed “consultant” expert, Mr. Loumiet, and a copy of his “consultant’s” work to Relator in the Kansas case. (RPW, Exhibit F (Exhibit C therein, Loumiet 10/29/1999 report)). The Kansas case is related to the underlying case pending in the Respondent’s court. (RPW, Exhibits C, D, J). No court ordered plaintiff to reveal the identity of Mr. Loumiet. Plaintiff voluntarily provided his name in an expert witness designation along with several other retained experts. No court ordered plaintiff to provide to plaintiff a copy of report prepared by Mr. Loumiet. Plaintiff did both voluntarily by way of his expert designation in the Kansas case. (RPW, Exhibits E, p. 2; F (Exhibit C therein)). Plaintiff cannot now complain. The authority of the *Brown v. Hamid* case decided by this Court and pointed out to the Respondent Circuit Judge at the motions hearing is clear. A party waives any claim of work product privilege by providing the information to the opponent. 856 S.W. 2d at 54. Plaintiff did just that when he identified Mr. Loumiet and provided a copy of Mr. Loumiet’s report about the intersection at issue to the Relator. (RPW, Exhibit “E,” p. 2, paragraph 6 (designation); Exhibit “F” (Exhibit C, report)). Relator can depose Mr. Loumiet about the report, its substance, Mr. Loumiet’s observations of the intersection and the vehicle involved, his decision-making, the conclusions he made, and any other matter or information considered by Mr. Loumiet in generating the October, 1999 report. Relator has entitlement to discover that information because of the waiver by Plaintiff’s prior disclosures. The court of appeals has recognized and applied this principle also. In no uncertain terms and without any

qualification, the court of appeals held in *State ex rel. Mitchell Humphrey & Co. v. Provaznik*, that the previous production in that case waived any claim of work product for a consultant's memoranda concerning the matters at issue. 854 S.W. 2d at 814, n. 3. The decision by Respondent to deny the discovery on the ground that no waiver has occurred amounts to an abuse of discretion or an excess of jurisdiction. *Brown v. Hamid*, 856 S.W. 2d at 54; *State ex rel. Mitchell & Co. v. Provaznik*, 854 S.W. 2d at 814, n. 3. There can be no dispute that Plaintiff identified Mr. Loumiet and provided Relator a copy of his report concerning the accident at issue in the Kansas case now dismissed and the case pending in Respondent's court.

Next, it is not important that Relator may use the report and any information obtained through discovery by occasion of the waiver in the related Kansas case against the Plaintiff in this case. Courts recognize that waiver sometimes works a disadvantage to the party originally entitled to the right. For instance, in the *Brown v. Hamid* case, this Court stated:

“In both formal and informal discovery, the Rules do not prohibit a party from trying to convince an expert that an opinion is erroneous, and should be reconsidered in light of particular facts or in light of the opinions of other experts.”

856 S.W. 2d at 54. In *Brandt v. Pelican*, 856 S.W. 2d 658, 663 (Mo. banc. 1993), this Court noted, “it is common practice to obtain favorable concessions from the other party's expert or treating physician” in the context of that case. In the criminal context, this Court determined in *State ex rel. Richardson v. Randall*, that “once the state has the handy bit of information regarding the anonymous expert, it always has it and may consult with [the expert] to the detriment of the [party who engaged the expert].” As noted in the Relator's Brief filed in the underlying case (RPW, Exhibit F, p. 3), it is certainly within the rules to call

for favorable testimony or concessions at trial from an opposing party's expert witness. *Smith v. Walmart Stores, Inc.*, 967 S.W. 2d 198, 205-206 (Mo. App. E.D. 1998).

The fact that the waiver of the work product privilege occurred in Plaintiff's related case in Kansas does not justify the action taken on that implicit ground by the circuit judge in the underlying case now before this Court. Just as the rules allow a party to shield its consulting expert's identity and work in one case, so it goes in reason and principle that what has been waived in one case cannot have privilege restored or be re-immunized in another, related case. In the matter before this Court, the claim of work product privilege stems from what is undoubtedly and without any dispute the same case, involving the same claims, and the same parties, but in a different venue. Under the principles of *State ex rel. Day v. Patterson*, the plaintiff cannot make secret and privileged again what he earlier provided to Relator. There is no claim, and can be no claim, by Plaintiff that the waiver occurred by mistake or inadvertence. (RPW, Exhibits "A" (transcript), H (motion to quash); RAW). Simply put, Plaintiff made no mistake. The disclosure did not occur inadvertently. The disclosure did not occur with any purpose to protect or preserve any privilege. The Plaintiff's trial preparations in the Kansas case caused him to reveal Mr. Loumiet's identity (Plaintiff also revealed the identities of several other "retained" medical experts, RPW, Exhibit E, pp 1-2) and further caused him to provide Relator a copy of his report (Plaintiff also provided copies of reports or records from several "retained" medical, economic, or life care planning experts. RPW, Exhibit E, pp 1-2 (detailing reports or records disclosures). Plaintiff did this willingly and voluntarily.

Mr. Loumiet's identity has been revealed and a copy of his report provided to Relator as noted. Mr. Loumiet, his work, his background and qualifications, the factual information noted in his report, and

any background material or information there considered, are the subject of the discovery request at issue. That information is subject to discovery under the Missouri rules, the cases teach, and once discovered, may be used in the trial of the matter in the Jasper County Circuit Court. Plaintiff cannot make secret and privileged from discovery in this case what has previously in another related case been surrendered and volunteered and become available and public. *Brown v. Hamid*, 856 S.W. 2d at 54; *State ex rel. Mitchell Humphrey & Co. v. Provaznik*, 854 S.W. 2d at 814, n. 3; *State ex rel. Day v. Patterson*, 773 S.W. 2d at 228; *State ex rel. Friedman v. Provaznik*, 668 S.W.2d at 78-80, 80; *State ex rel. Dixon v. Darnold*, 939 S.W.2d at 68-71. A waiver of privilege cannot be revoked or withdrawn. Cf. *Cline v. William H. Friedman & Assoc., Inc.*, 882 S.W.2d 754, 761 (Mo. App. E.D. 1994)(waiver of medical privilege cannot be withdrawn)(citing *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 672)).

The *State ex rel. Tracy v. Dandurand* concerns different facts and a different claim of privilege, and does not control the issues before this Court. Beyond the *dicta* relied upon by the Plaintiff and argued to the circuit judge, the holding in that case – waiver had occurred – supports Relator’s argument before this Court. For purposes of preserving a claim of attorney/client privilege, once the information-revealing deposition had been taken, the waiver of privilege had occurred. Contrary to the argument of the Plaintiff at the motions hearing, and the reasoning of the Respondent Circuit Judge, the fact that Mr. Loumiet’s deposition had not occurred does not mean that Plaintiff’s work product privilege claim remains preserved. This Court in *State ex rel. Tracy v. Dandurand* did not overrule the *Brown v. Hamid* case or the Court of Appeals’ decision, *State ex rel. Mitchell Humphrey v. Provaznik*, noted and discussed herein. The *Hamid* and *Mitchell Humphrey* cases directly address the issue of

waiver of work product privilege by prior production and how same occurs by the voluntary disclosure of the materials or information. To that extent, the *Brown v. Hamid* and *State ex rel. Mitchell Humphrey v. Provaznik* cases, and each of them, govern the issues herein. The information-revealing event has occurred regarding Mr. Loumiet. This waiver did not occur by way of deposition. The waiver occurred prior to the deposition. Plaintiff's revealing Mr. Loumiet's name and disclosing his report worked the waiver in this case. The information-revealing event, identification and providing a copy of the report, occurred before the deposition. That waiver cannot be revoked. Dubbing Mr. Loumiet a "consultant" for purposes of this case accomplishes nothing more than conferring a title. This does not defeat the waiver of work product privilege already accomplished. The Respondent exceeded his jurisdiction or abused his discretion in not giving proper judicial effect to same, and in so doing, failed to the detriment of Relator in denying and refusing to allow the discovery requested by Relator. *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 862, 863 (Mo. banc 1986); *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 175 (Mo.App. W.D. 2000).

The effect of the Respondent's ruling is that although it knows the identity and substance of his opinions, and could call Mr. Loumiet as a witness at trial, Relator can proceed with informal discovery, if allowed, and consult with Mr. Loumiet to Plaintiff's detriment, but cannot take his deposition to discover the facts and opinions and background information which Plaintiff revealed in documents and papers served or provided his adversary the Relator in essentially the same case, but in a different state. This result is error, which no appeal can correct. *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 175 (Mo.App. W.D. 2000).

The Respondent's ruling is wrong, against the just, speedy, and inexpensive administration of justice, and further, is in excess of jurisdiction or abuse of discretion, and enforcement of the order should be prohibited permanently by this Court. The Respondent has the duty to foster the discovery process, and since no decision or rule exists which would excuse the Respondent from any other course of action, this Court should enforce that duty, and prohibit the Respondent from enforcing his order.

## **CONCLUSION**

This Court should exercise its superintending power and restrain the Respondent Circuit Judge from enforcing his February 7, 2001 Order sustaining Plaintiff's Motion to Quash and for Protective Order.

The Relator should be allowed to take the deposition of Mr. Loumiet concerning his accident reconstruction activities, his opinions and conclusions, and his work reflected in his October 29, 1999 report, including the information he considered, the documents he considered, and his professional analysis and conclusions and opinions regarding the accident and contributing causes related thereto at issue.

This Court should grant the relief requested by Relator for the following reasons.

Plaintiff waived any work product privilege as to the identity of Mr. Loumiet and his report because he disclosed Mr. Loumiet's name and provided a copy of the report at issue. Missouri courts recognize that the work product privilege applies in related litigation. The underlying case now pending before the Respondent is virtually the same litigation involved in the prior Kansas case brought by the Plaintiff involving the same parties, the same issues, and the same claims concerning the collision at the intersection. Those things are all at issue in the case now pending before the Respondent.

A party entitled to assert work product privilege may also waive that privilege as to related litigation. That waiver occurred in this case, because Plaintiff provided Mr. Loumiet's name and his report to the Relator. There is no question the information sought by Relator is relevant and material to the underlying case. Also, there is no claim and can be no claim that the Plaintiff provided the name of Mr. Loumiet and his report with an intention or purpose to preserve any privilege. The revelation of Mr. Loumiet's name and providing a copy of his report to Relator did not occur by accident or inadvertence. It occurred voluntarily. Accordingly, the Relator respectfully requests this Court agree, and order the

Respondent to vacate his order and allow the deposition and discovery requested by Relator to proceed in the underlying case.

WHEREFORE, in consideration of the foregoing, the Relator respectfully requests an Order of this Court enter its permanent order in prohibition which bars the Respondent and any other judge of the Circuit Court of Jasper County, Missouri, from enforcing the Order entered February 7, 2001, sustaining Plaintiff's Motion to Quash Subpoena and for Protective Order, and for other relief just and proper herein.

Respectfully submitted,

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**CERTIFICATE REQUIRED BY SPECIAL RULE NO. 1**

On behalf of the Relator, I rely upon the Word Perfect Version 8.0 Program used to prepare this brief, and certify the following:

1. The Relator's Opening Brief complies with the limitations contained in Special Rule No. 1(b);
2. The Relator's Opening Brief contains 7,947 words.

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### **84.06 (c) CERTIFICATION**

I hereby certify that this brief contains the information required by Rule 55.03.

Further, this brief complies with the limitations contained in Rule 84.06 (b) in that it contains 7,947 words, and that this disk has been scanned for viruses and is virus free.

I hereby certify that a copy of the above and foregoing  
RELATOR'S OPENING BRIEF was sent via U.S. mail,  
postage prepaid, this 19<sup>th</sup> day of October, 2001, to:

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